Supreme Court, U.S.
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No. 95-650

In The

Supreme Court of the United States

October Term, 1995

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY, and GEORGE SAMUEL ROBINSON,

Petitioners,

v.

AUDI AKTIENGESELLSCHAFT f/k/a AUDI NSU AUTO UNION AKTIENGESELLSCHAFT, and VOLKSWAGEN OF AMERICA, INC.,

Respondents.

AND

HARRY ROBINSON, KAY ROBINSON, EVA MAY McCARTHY and GEORGE SAMUEL ROBINSON,

Petitioners,

v.

VOLKSWAGENWERK AG and HERZFELD & RUBIN, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF

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There are two cases here on this Petition. *Robinson v. Volkswagenwerk*, 93-5168 in the Court of Appeals (the common law fraud suit), was decided on the pleadings alone. *Robinson v. Audi*, 92-5238 in the Court of Appeals (the independent action), was dismissed following a trial to the court under Rule 60(b). Respondents' Opposition conflates the two cases.

1. The trial court made two and only two findings. The first finding was:

> "As a preliminary matter, the court must concede that had it been apprised of the material contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law (FF/CL) filed July 27, 1992 at pp. 38-42 (nos. 53-55) the . . . exhibits at issue would most assuredly have been admitted into evidence. Indeed, it seems fair to say that if the relevant corporate relationships set forth in Plaintiffs' FF/CL, cited above had been on record, VWAG would have been joined as a party defendant. And the Court so finds." [APP. *at* 47.]

The second finding followed immediately:

> "However, nowhere in this meticulously prepared and effectively argued claim does there appear clear and convincing evidence that Defendants' counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this Court through misrepresentation and nondisclosure. In the absence of such evidence, the Court is bound by the relevant case law to deny Plaintiffs' Motion. This case is, accordingly, dismissed." [APP. *at* 47.]

The first finding has no "if true" qualifier as Respondents suggest (RESPONDENTS' BRIEF IN OPPOSITION *at* 11). Any assertion that the trial court's findings encompassed, by implication or otherwise, anything other than the factual predicate the trial judge believed was required by his understanding of what he called "the savings clause issue" of fraud on the court is belied by his own words. The trial court expressly limited his inquiry to fraud on the court:

> "Rule 60(b) provides, in part, for relief from judgment on the grounds of mistake or excusable neglect; newly discovered evidence; fraud, misrepresentation or other misconduct of adverse party *if* the action is brought within one year after the judgment is entered. It also provides a savings clause: 'this rule does not limit the power of a court to entertain an independent action . . . to set aside a judgment for fraud upon the court.' Rule 60(b). Based upon the one year rule, *this Court's inquiry will not encompass fraud and/or misrepresentation, generally, but will be strictly limited to the savings clause issue of fraud upon the Court.*" [APP. *at* 42.] [First emphasis in original; second emphasis added.]

The evidence that the trial judge found to be absent was "that Defendant's counsel was involved in a 'deliberately planned and carefully executed scheme' to defraud this court through misrepresentation and nondisclosure." Obviously, the absence of "**such evidence**" does not suggest the existence of some other evidence, but does reflect the court's understanding of the case law that he felt "bound" him to deny the plaintiffs' request to set aside the judgment.

This record *is* clear. There is no need for conjecture about what other or different finding the evidence might or might not support. There is no room to speculate as to what other things might or might not have been in the trial court's mind. In the Respondents' words, the second finding is the "dispositive factual finding" (RESPONDENTS' BRIEF IN OPPOSITION *at* 10, 12). This Petition directly challenges the legal standard which the trial court applied to that single dispositve finding.

2. It is true that, as part of our pretrial contentions in the independent action, we contended that the representations were made to the court as part of a scheme and plan to deceive the court. We believed then, and believe now, that the evidence would support such a finding. The trial judge found only that there was insufficient *clear and convincing* evidence that defendants' counsel was involved in a deliberately planned and carefully executed scheme to defraud the court through misrepresentation and nondisclosure. That ended that matter under the legal standard that the judge felt "bound" him.

But that contention was not our only contention. Indeed, the pretrial order precisely reflects the contention which we make here and the other contentions we have made from the beginning. It is found in Pre-Trial Order, Appendix E, Plaintiffs' Contentions:

> "2. Plaintiffs contend that the Defendants knew that the answers and representations were either (a) untrue, or (b) in the exercise of reasonable diligence, would be found to be untrue, or (c) made with reckless disregard for the truth, or (d) were made in the context of volunteering information which omitted to state material

> facts, which omissions made the statements materially false and misleading." [APLT.APP. *at* 152.]

The Petitioners' pleading and the pretrial contentions embraced the full range of legal possibilities from the most relaxed (*Averbach v. Rival Mfg. Co.*, 809 F.2d 1016 (3rd Cir. 1987)) standard to the most rigid standard suggested by the factual language of *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). Indeed, the language of 7 Moore's Federal Practice §60.33 (1985), 11 Wright & Miller, Federal Practice and Procedure §2870 (Rule 60), and some dicta in the 10th Circuit reflect the conflict within that circuit as well as the nation. The confusing and different formulations in the other courts of appeal led us to wear both a belt and suspenders because in the real world alternative pleading and alternative contentions are not only allowed but often necessary. But that is, in a sense, beside the point because the conflict in the circuits is two-fold. There is conflict in regard to whether a scheme or plan is required when a lawyer is involved, but more to the point is the kind of intent or scienter that must be proven. That is where the reckless disregard standard adopted in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 295 (1994) conflicts with the kind of criminal scienter required by the 10th Circuit in this case.

We took the same approach in the common law fraud suit (93-5168) that was dismissed on the pleadings. As part of the complaint a scheme and plan was pleaded, not as the only species of fraud claimed but as one of several configurations of legal claims we believed we could prove to a jury. In addition, alternative bases for common

law fraud, including the contentions quoted above from the independent action, were pleaded. APLT.SUPP.APP. *at* 51-55. We have sought relief on every theory the factual allegations of the pleading would support. Unless as a mater of law the common law fraud suit cannot be brought until the judgment has been set aside and the standard for setting aside the judgment is the restrictive standard applied by the trial court, this pleading is viable under the standard of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and should not have been dismissed. That there were pleadings in the alternative is expressly allowed by Rule 8(e)(2), Federal Rules of Civil Procedure.

3. The court below itself pointed out the direct conflict with *Demjanjuk* [APP. *at* 18]. Respondents also concede with respect to *Averbach* that "In this regard, the Third Circuit espoused a more lenient standard than did the court below . . . " RESPONDENTS' BRIEF IN OPPOSITION *at* 22. There is a conflict among the courts of appeal.

Even a casual review of the cases cited in the treatises and commentaries indicate that the cases are all over the lot in regard to both the common law fraud case and the independent action. *Hazel-Atlas* is itself not clear as to whether or not the factual situation there is a sufficient, but not necessary, condition and if so, what the necessary condition is. The matter has been wrestled with for 50 years. *Hazel-Atlas* has been cited in over 250 federal cases for a remarkable variety of rules. Nobody denies that what happened in *Hazel-Atlas* must be condemned and sanctioned. But fraud, as Lord MacNaghten said: " . . . is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue,

and then it is modest and retiring; it would be honesty itself if it could only afford it." *Reddaway v. Banham*, A.C. 199, 221 (1896). What measure of fraud upon the court is needed to protect the myriad interests at stake is an important issue of federal law that is decidedly unclear. It is likely to recur, has been recurring, and the lower courts are in disagreement about the governing principle. It is a matter of substantial public interest that goes to the very core of the operation of the federal courts as instruments of justice and the duties of officers of the court. There is no further study required in the lower courts. Certiorari should be granted.

Respectfully submitted,

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